

Adco Metals, Inc. and Shopmen's Local Union No. 502, International Association of Bridge, Structural and Ornamental Iron Workers, AFL-CIO.
Case 4-CA-15410

17 October 1986

DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS
JOHANSEN AND BABSON

Upon a charge filed 7 November 1985 by Shopmen's Local Union No. 502, International Association of Bridge, Structural and Ornamental Iron Workers, AFL-CIO, the General Counsel of the National Labor Relations Board issued a complaint on 17 December 1985 against the Respondent, Adco Metals, Inc., alleging that it had violated Section 8(a)(1) of the National Labor Relations Act. Copies of the complaint and notice of hearing were served on the Respondent. The Respondent filed a timely answer denying the commission of any unfair labor practices.

On 21 March 1986 the parties and the General Counsel moved the Board to transfer the instant proceeding to the Board without benefit of a hearing before an administrative law judge, and they submitted a proposed record consisting of the formal papers and the parties' stipulation of facts with attached exhibits. On 29 May 1986 the Board issued an order granting the motion, approving the stipulation, and transferring the proceeding to the Board. The General Counsel and the Respondent filed briefs.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

On the entire record in this case, the Board makes the following findings.

I. JURISDICTION

The Respondent is a Delaware corporation engaged in the fabrication and erection of steel at its facility located in New Castle, Delaware. The Respondent, in the course and conduct of its business operations within the State of Delaware, annually purchases and receives goods valued in excess of \$50,000 directly from points outside the State of Delaware. Accordingly, we find that the Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. THE UNFAIR LABOR PRACTICES

A. Issue

The issue presented is whether the Respondent violated Section 8(a)(1) of the Act by notifying its employees in writing that they could expect to be subpoenaed as witnesses in a Federal proceeding if they signed a union authorization card.

B. Facts

The Respondent employed approximately 60 shop employees who were not represented by any labor organization and approximately 50 ironworkers who were represented by Iron Workers Local 451. The Charging Party was engaged in a campaign to organize the Respondent's shop employees. On 22 October 1985 the Charging Party distributed 39 authorization cards among the Respondent's unrepresented shop employees. Four of these authorization cards were signed, dated, and subsequently returned to the Charging Party. The Charging Party has not filed a representation petition with the Board seeking to represent any of the Respondent's employees.

On or before 24 October 1985 the Respondent became aware that authorization cards had been distributed and, about that same date, the Respondent distributed to its employees the following statement signed by the Respondent's president, Elmer P. Renzi:

Before you consider signing a union authorization card, keep in mind, by signing the card, it is not a free ride. Anybody that signs the union card can expect to be subpoenaed as a witness in a federal proceeding.

C. Contentions of the Parties

The General Counsel contends that the Respondent violated Section 8(a)(1) of the Act by distributing the above statement. The General Counsel asserts that the statement carried the obvious implication that harm of retaliation would result from disclosure of the identity of the cardsigner to the Respondent and was therefore a deterrent to union affiliation. The General Counsel argues that the Respondent had "no reason for informing [its] employees that they might be required to testify . . . other than to let them know that the names of union adherents could be ascertained and appropriate reprisals taken," and, further, that even if the Respondent had not "exaggerated" that a cardsigner "can expect to be subpoenaed," the truthful-

ness of a statement does not insulate the statement if it is an unlawful threat.¹

The Respondent contends that its written communication contained no threats or coercive statements, express or implied, and that there was no background of threatening or coercive employer conduct from which an inference of harm or retaliation might be drawn. The Respondent also argues that its handout was a fair statement of the law or, in the alternative, that, if a misstatement, it is not so blatant as to constitute a per se violation of the Act.

D. Discussion and Conclusions

We recently held, in *Southwire Co.*, supra, that an employer's statements similar to the one at issue in the instant case constituted an unlawful threat of retaliation against employees who had signed authorization cards. In doing so, we emphasized that "the violation flow[ed] from the context in which the [r]espondent made the statements."² For similar reasons, we find that the Respondent's statement to employees in this case unlawfully threatened them with retaliation if they signed authorization cards. In this regard, although the presence of independent evidence of union animus has been a significant circumstance in several of the cases relied on by the General Counsel, such evidence is not a prerequisite to finding a violation. Solicitation of authorization cards plays a vital role in organizational campaigns, and we recognize the "chilling" effect on the right of employees to signify their union support if they know that their employer can readily ascertain their identity.³ The statement here was signed by the president of the Company and distributed to the employees just after they had received union authorization cards and while they were in the statutorily protected process of making a decision about joining the Union. In addition, the Respondent had no apparent legitimate justification for circulating its statement at that time. Furthermore, the admonition that "it is not a free ride" suggests some cost to employee cardsigners as a consequence of the disclosure of their identities. Although not dispositive, we also note that the Respondent has overstated in absolute terms the inevitability of subpoenaed testimony. There are many

instances in which neither the Board nor the Federal courts will permit forced disclosure of the identity of employees who sign cards seeking union representation.⁴

Our finding of the potential impact on employees of the Respondent's statement is consistent with numerous Board and court cases. For example, in support of its holding that authorization cards may not be obtained from the Board by an employer in a Freedom of Information Act proceeding, the United States Court of Appeals for the Sixth Circuit stated in *Madeira Nursing Center v. NLRB*, supra at 730-731:

When an employee signs an authorization card during the initial phase of union organization, he expresses a personal decision to seek the support of a union in future dealings with his employer. Since the union organization of a company may take the form of a protracted and bitter struggle over employee loyalties, an employee may be amply justified in wishing to protect his pro-union declaration from employer scrutiny.

We would be naive to disregard the abuse which could potentially occur if employers and other employees were armed with this information. The inevitable result of the availability of this information would be to chill the right of employees to express their favorable union sentiments. Such a chilling effect would undermine the rights guaranteed by the N.L.R.A., and, for all intents and purposes, would make meaningless those provisions . . . which guarantee secrecy in union elections [quoting *Pacific Molasses Co. v. NLRB*, 577 F.2d at 1182].

We also note the Board's "customary rule"⁵ is to hold authorization cards in confidence during representation cases. In our view, therefore, the importance to employees of maintaining anonymity during organizing campaigns is both obvious and well-recognized, and we cannot approve of the Respondent's statement, which threatened that it would learn the identities of employees who signed such cards. Furthermore, with respect to the Employer's threat that employees who signed cards would be forced to testify as witnesses in a Federal proceeding, we point out the Supreme Court recognized in *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214 (1978), the "all too familiar unwillingness [of employees] to 'get too involved' [in formal

¹ In support of these contentions, the General Counsel cites, inter alia, *Southwire Co.*, 277 NLRB 377 (1985), *Heck's Inc.*, 273 NLRB 202 (1984), and 272 NLRB 227 (1984), *Huntington Rubber Co.*, 260 NLRB 1008 (1982), *Arrow Automotive Industries*, 256 NLRB 1027 (1981), enf. 679 F.2d 875 (4th Cir. 1982); *Lundy Packing Co.*, 223 NLRB 139 (1976), enf. denied in relevant part 549 F.2d 300 (4th Cir. 1977), *Finesilver Mfg Co.*, 160 NLRB 1400 (1966), enf. in relevant part 400 F.2d 644 (5th Cir. 1968)

² 277 NLRB at 377.

³ *Heck's Inc.*, supra; *Committee on Masonic Homes v. NLRB*, 556 F.2d 214, 221 (3d Cir. 1977).

⁴ See, e.g., *Madeira Nursing Center v. NLRB*, 615 F.2d 728 (6th Cir. 1980); *Pacific Molasses Co. v. NLRB*, 577 F.2d 1172 (5th Cir. 1978), *Committee on Masonic Homes v. NLRB*, supra

⁵ *Midvale Co.*, 114 NLRB 372, 374 (1955)

proceedings] unless absolutely necessary.” *Id.* at 240–241. The Court acknowledged in the context of that case the positive effects of the Board’s ability to assure witnesses who give affidavits during investigations “that in most instances their statements will not be made public.” *Id.*

We do not hold here that the precise words used by the Respondent in this case would establish a violation under all circumstances. As noted above, however, there is no evidence that employees expressed to the Respondent’s officials any confusion about the ramifications of signing a union card or that the Respondent reasonably contemplated litigation of issues related to cardsignings, and therefore the Respondent had no apparent legitimate justification for its conduct. Finally, we do not hold that the violation depends on the truth or falsity of the Respondent’s statement. The violation stems from what this Board, in its cumulative experience, views as the plain coerciveness of an employer’s statement that cardsigners not only will be *identified*, but will be forced to testify in a Federal proceeding whether they may wish to or not—and all of this in the absence of any issues, which is or is likely to be litigated concerning the signing of union authorization cards.

Based on the foregoing, we conclude that the Respondent’s statement that cardsigners can “expect to be subpoenaed” reasonably tended to discourage employees from signing the union authorization cards by instilling fear of reprisals. We therefore find that the statement violated Section 8(a)(1) of the Act.

CONCLUSIONS OF LAW

1. Adco Metals, Inc. is engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Shopmen’s Local Union No. 502, International Association of Bridge, Structural and Ornamental Iron Workers, AFL–CIO is a labor organization within the meaning of Section 2(5) of the Act.

3. By distributing to its employees a written statement from the Company’s president indicating that employees who sign union authorization cards can expect to be subpoenaed, the Respondent has engaged in an unfair labor practice within the meaning of Section 8(a)(1) of the Act.

4. The aforesaid unfair labor practice is an unfair labor practice affecting commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in an unfair labor practice, we shall order that it cease and desist therefrom and that it take certain

affirmative action to effectuate the policies of the Act.⁶

ORDER

The National Labor Relations Board orders that the Respondent, Adco Metals, Inc., New Castle, Delaware, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Restraining employees from signing union authorization cards.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Post at its facility in New Castle, Delaware, copies of the attached notice marked “Appendix.”⁷ Copies of the notice, on forms provided by the Regional Director for Region 4, after being signed by the Respondent’s authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(b) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

CHAIRMAN DOTSON, concurring.

I can concur in the result only on the basis that, in the context of the stipulated facts, the statement that employees “can expect to be subpoenaed as a witness in a federal proceeding” can reasonably be construed as a statement of an intention on the part of the Employer to involve employees in the inconvenience of “a federal proceeding” without lawful and proper cause as retaliation for signing a card. This is particularly true in view of the fact that in the usual course of representation proceedings the identity of cardsigners is not revealed as a result of legal processes. On the other hand, it is a fact that numerous circumstances, such as demands for recognition, litigation, and informal communications, can lead to the disclosure of the identity of cardsigners without regard to their desire for ano-

⁶ The General Counsel’s request that the remedial order include a visitatorial clause is denied.

⁷ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading “Posted by Order of the National Labor Relations Board” shall read “Posted Pursuant to a Judgment of the United States court of appeals enforcing an Order of the National Labor Relations Board.”

nymity. As a practical matter, employees cannot sign cards with the assurance that their identities will not be disclosed.

It is difficult to understand why a settlement could not be reached before so much of the Board's and parties' resources were expended on this case.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

WE WILL NOT restrain you from signing union authorization cards.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

ADCO METALS, INC.